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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AUG 15 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)	MM Docket No. 93-75
)	
TRINITY BROADCASTING OF)	
FLORIDA, INC.)	BRCT-911001LY
)	
For Renewal of License of)	
Television Station WHFT(TV))	
Miami, Florida)	
)	
GLENDAL E BROADCASTING)	
COMPANY)	BRCT-911227KE
)	
For Construction Pedmit for)	
New Television Station in)	
Miami, Florida)	

To: The Honorable Joseph Chachkin
Administrative Law Judge

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
FILED BY GLENDAL E BROADCASTING COMPANY
(RED LION ASSIGNMENT APPLICATION ISSUE)

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August 15, 1994

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Authorities.....	iv
Summary.....	v
I. Preliminary Statement.....	1
II. Proposed Findings of Fact.....	2
A. Narrative recital of facts and circumstances.....	2
Agreement to sell Red Lion construction permit for \$10,000.....	2
Development of information concerning reimbursable costs of Raystay.....	4
Contemporary evidence that \$10,000 was a good faith figure for the Red Lion construction permit.....	5
Aggregate cost estimates for all five construction permits.....	6
Allocation of a portion of the aggregate costs to the Red Lion permit.....	8
Preparation of expense certification for filing with the FCC.....	10
Signature of expense certification and assignment application.....	12
Justification for reliance on communications counsel by Raystay.....	13
FCC acceptance of expense certification.....	13
B. Analysis of the expense allocation.....	14
(1) Legal fees.....	15
(2) Engineering fees.....	17

One-third allocation to Red Lion based upon site-oriented engineering work for three transmitter locations...	17
Three frequency studies and reports by the engineer for Red Lion, Lebanon and Lancaster.....	18
Engineering work to secure FAA clearance of the three sites with Red Lion as the lead application for FAA consideration of "EMI" problems associated with all three transmitter sites.....	19
Engineering portions of FCC applications involved less work per application for the two applications each for Lebanon and for Lancaster than for the single application for Red Lion.....	20
Mr. Berfield's allocation was a reasonable one.....	21
When an additional payment to the engineer not known by Mr. Berfield at the time of his allocation is considered -- the engineering fees for the Red Lion permit should have, if anything, been \$100 more than he allocated.....	22
(3) FCC filing fee.....	23
III. Proposed Conclusions of Law.....	23
A. Applicable standards.....	23
B. Application of those standards to the case at bar shows no basis to disqualify Glendale for any misrepresentation or lack of candor on the part of Raystay.....	25
(1) The preponderance of the evidence shows that no false statement of an essential fact was made to the Commission.....	26
Legal fees.....	26
Engineering fees.....	29

FCC filing fee.....	33
Total amount allocated.....	33
(2) The preponderance of the evidence shows that there was no intentional failure to state an essential fact to the Commission.....	34
(3) The preponderance of the evidence shows that there was no intent on the part of Raystay to deceive the Commission.....	37
IV. Conclusion.....	42
Appendix (FCC Form 345 and Instructions)	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>JUDICIAL DECISIONS:</u>	
<u>McElroy Electronics Corporation</u> <u>v. FCC</u> , 990 F.2d 1351 (D.C.Cir. 1993).....	36
<u>Salzer v. FCC</u> , 778 F.2d 869 (D.C.Cir. 1985).....	36
<u>Steadman v. SEC</u> , 450 U.S. 91 (1981).....	24
<u>WADECO, Inc. v. FCC</u> , 628 F.2d 122 (D.C.Cir. 1980).....	25
<u>ADMINISTRATIVE DECISIONS:</u>	
<u>Broadcast Associates of Colorado</u> , 104 FCC2d 16, 60 RR2d 721 (Commission 1986).....	25
<u>Cannon Communications Corp.</u> , 5 FCC Rcd. 2695 (Rev.Bd. 1990).....	24, 25
<u>D. H. Overmyer Communications Co., Inc.</u> , 54 FCC2d 1045, 34 RR2d 1317 (Rev.Bd. 1975).....	8
<u>Fox River Broadcasting, Inc.</u> , 93 FCC2d 127, 53 RR2d 44 (Commission 1983).....	24
* <u>Integrated Communications Systems, Inc.</u> <u>of Massachusetts</u> , 5 RR2d 725 (Rev.Bd. 1965)....	9, 38-40
<u>Superior Broadcasting of California</u> , 94 FCC2d 904, 54 RR2d 773 (Rev.Bd. 1983).....	35
<u>STATUTES AND REGULATIONS:</u>	
5 U.S.C. §§552-53.....	35
44 U.S.C. §1205.....	35
47 C.F.R. §73.3597(c)(3)(ii).....	34
<u>MISCELLANEOUS:</u>	
* FCC Form 345 and Instructions.....	34
* Denotes authorities principally relied upon	

SUMMARY

We provide proposed findings of fact with citations to the supporting evidence in the record, and proposed conclusions of law with citations to precedent in support of our conclusions.

The record shows that the expense certification in the Red Lion assignment application complied with the Commission's requirements under its regulation and for which there were no further requirements on the application form or related instructions. The expense certification was both complete and accurate. The witnesses, primarily Mr. Berfield, offered comprehensive direct testimony, sustained that testimony under cross examination and provided supporting documentation. No rebuttal evidence was offered by Trinity or the government counsel. The one item of evidence on which Trinity relied in seeking the issue, an invoice from the engineer, under evidentiary scrutiny, did not support Trinity's claim of overstatement of the Red Lion expenses. Moreover, at the hearing the evidence showed that the engineer had been paid an additional sum that had not been taken into account and that Mr. Berfield's allocation for the engineering fee was understated. There is no valid question regarding the allocation of legal fees and FCC filing fees.

Since the expense allocation was accurate, there is no basis for a conclusion of misrepresentation. Nor is there any basis for a conclusion of lack of candor. No essential fact was

withheld from the Commission. The expense certification complied with the Commission's requirements. The Commission's staff did not ask for documentation or other additional information, and approved the application without question. The expense certification was prepared without any intention or motivation to deceive the Commission in any way.

The only published opinion regarding an allocation of expenses among multiple construction permits or applications, Integrated Communications of Massachusetts, holds that the good faith analysis of time records and invoices is an acceptable method of establishing such an allocation. Mr. Berfield correctly interpreted that to be the principle established in the Integrated case -- not that expenses must be applied equally across the number of permits or applications involved, as Trinity has argued. The Court's acceptance of Trinity's argument in adding the issue has since been modified upon a closer reading of the opinion in that case during the course this hearing as testimony was adduced, and the Court and counsel engaged in dialogue regarding the import of the Integrated decision.

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To: The Honorable Joseph Chachkin
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FILED BY GLENDALE BROADCASTING COMPANY
(RED LION ASSIGNMENT APPLICATION ISSUE)

1. These proposed findings and conclusions are addressed to the Red Lion assignment application issue relative to Glendale Broadcasting Company (Glendale).

I.
PRELIMINARY STATEMENT

2. For a detailed preliminary statement, see the proposed findings and conclusions on all other issues filed by Glendale. The Red Lion assignment application issue was added by this Court by Memorandum Opinion and Order released October 4, 1993, FCC 93M-631, and reads as follows:

To determine whether Raystay Company made misrepresentations or lacked candor in its application to assign the construction permit of low power television station W23AY, Red Lion/York, Pennsylvania (BAPTTL-920114IB), and if so, the effect thereof on Glendale Broadcasting Company's qualifications to be a licensee.

Hearing sessions were held on this issue on May 3, 4 and 5, 1994 at which time the record was closed. Tr. 5739-40.

II.
PROPOSED FINDINGS OF FACT

A.
Narrative recital of facts and circumstances

3. Agreement to sell Red Lion construction permit for \$10,000. In the spring of 1991, the principal of the assignee, Dennis Grolman, contacted George Gardner ¹ and expressed interest in the Red Lion construction permit. TBF Ex. 240, Glendale Ex. 226 at 1. George Gardner assigned responsibility for the matter to Lee H. Sandifer. Id. Mr. Sandifer spoke with Mr. Grolman in the spring of 1991. Glendale Ex. 228 at 1. After the "LMA" agreements between Raystay Co. (Raystay) and Quality Family Companies were terminated in August 1991 (see TBF Ex. 223), further discussions were held with Mr. Grolman. Id.

4. By October 3, 1991 Mr. Sandifer had discussed with Mr. Grolman a range of \$10,000 to \$25,000 as the floor and ceiling prices, respectively, for the sale of the Red Lion construction permit. Tr. 5563. When Mr. Sandifer gave that range, he did not know what Raystay's costs were with respect to the Red Lion permit. Tr. 5564.

5. In a telephone conversation on October 10, 1991, Mr. Sandifer and Mr. Grolman agreed to a sale of the Red Lion permit

¹ George Gardner and most of the other persons and entities referred to in this document are being identified in the proposed findings and conclusions on all other issues. Additional identifying information will be given here as may be needed in the context of these proposed findings and conclusions.

for \$10,000. Glendale Ex. 228 at 1, TBF Ex. 272 at 2, Tr. 5565. Around that time, George Gardner approved the \$10,000 price. Glendale Ex. 226 at 1, Glendale Ex. 228 at 2, Tr. 5566. Mr. Sandifer still had no knowledge of what expenses Raystay had incurred with respect to the permit. Tr. 5565. There is nothing untoward or unusual in "reimbursement of expenses" cases (such as the sale of construction permits or settlement of hearings) for parties to discuss a prospective figure and then research the matter to determine if that figure can be justified. Glendale Ex. 224 at 2. ²

6. The sale and purchase agreement was drafted by communications counsel for the purchaser-assignee, the law firm of Arent, Fox, Kintner, Plotkin & Kahn. Glendale Ex. 228 at 1-2. It included the required provision that the amount of the consideration would not exceed that determined by the Commission to be reimbursement of legitimate and prudent expenses in accord with its rules and regulations. TBF Ex. 275 at 3. Raystay had the option of terminating the transaction if the Commission did not approve the agreed upon price, or electing to go forward with the transaction at a lesser price as approved by the Commission.

² Testimony of Morton L. Berfield of the firm Cohen & Berfield, communications counsel for Glendale. Mr. Berfield received the degree of Doctor of Jurisprudence from the Law School of the University of Michigan in 1958, was employed as an attorney with the FCC from 1959 to 1964 including service in the Hearing Division of the Broadcast Bureau, and has practiced law with Lewis I. Cohen in the firm Cohen & Berfield since 1964. Glendale Ex. 224 at 1. Accordingly, this testimony reflects experience both in the Hearing Division and in private law practice dating back 35 years.

Id., Glendale Ex. 228 at 2, Tr. 5570-72.

7. Development of information concerning reimbursable costs of Raystay. On October 8, 1991, Mr. Sandifer and Mr. Berfield talked about the Commission's limitation on recovery of documented out-of-pocket costs for the transfer of the Red Lion permit, the concept of allocating certain expenses to the Red Lion permit and the need for Cohen & Berfield to work with David Gardner in determining attributable costs. Tr. 5596-97.

8. Mr. Sandifer asked David Gardner to gather information on Raystay's expenses with respect to all five construction permits, i.e., two permits for Lancaster, two permits for Lebanon and the single permit for Red Lion/York. Tr. 5567. In response, David Gardner prepared a handwritten tabulation dated October 17, 1991 listing certain expenses aggregating \$15,464.04. Glendale Ex. 227 at 2, 6, Tr. 5567, 5586. Mr. Sandifer understood that the tabulation was a preliminary outline of the costs. Tr. 5589. He believed there were additional legal (and possibly engineering) costs, and he directed David Gardner to contact Mr. Berfield to determine additional costs. Glendale Ex. 228 at 4, Tr. 5589-90, 5594-95.

9. At about this same time, on October 30, 1991, Trinity offered to pay \$5,000 for each of Raystay's construction permits. Glendale Ex. 227 at 2. Then, between October 30th and November 7th, David Gardner called Mr. Berfield and asked him to develop the expenses that could be reimbursed in the event of the sale of all of the permits. Id. Mr. Berfield was given \$30,000 as an

amount for which the five permits might be sold. Glendale Ex. 224 at 1-2. David Gardner testified that the \$30,000 figure would have been a combination of \$10,000 for the possible sale of the Red Lion permit and \$5,000 each for the possible sale of the other four permits to Trinity. Glendale Ex. 227 at 2-3, TBF Ex. 232.

10. Contemporary evidence that \$10,000 was a good faith figure for the Red Lion construction permit. This record reflects contemporaneous evidence from the time period October-November 1991 that the allocation of expenses in support of a \$10,000 price for the Red Lion permit was done in good faith and was not part of any effort to inflate that price in a manner to obtain payment in excess of legitimate costs:

(a) The \$30,000 figure as a targeted amount for all five permits that was given to Mr. Berfield by David Gardner -- was set forth in Mr. Berfield's then contemporaneous letter dated November 7, 1991. TBF Ex. 232, Glendale Ex. 224 at 1-2. There is no doubt that said letter is genuine and was written in that time period.

(b) In October-November 1991, the only combination of prices under discussion that yielded the \$30,000 aggregate figure was the \$10,000 price for Red Lion under discussion with Mr. Grolman and the lesser \$5,000 price for each of the other four permits that had been offered by Trinity. Glendale Ex. 227 at 2-3. There is no reason to doubt this fact. No party has raised any question on the record as to its accuracy. Accordingly,

Raystay gave its communications counsel the assignment to determine if reimbursable expenses added up to the aggregate of the maximum potential prices for all five permits -- and nothing more.

(c) Mr. Sandifer testified that he was the person who negotiated the \$10,000 price for the Red Lion permit, and in so doing there was no intent that such a price would be used for the sale of any of the other four permits in any manner so as to exceed the reimbursable expenses under the FCC rules and regulations. Glendale Ex. 228 at 4.

(d) He testified, for example, that if the FCC approved \$10,000 as reimbursable expenses for the Red Lion permit, and if Raystay's total reimbursable expenses turned out to be \$30,000, the intent was that the cap on the amount for which the other four permits could be sold would have been \$20,000. Id.

(e) He gave as another example, if Raystay's total reimbursable expenses turned out to be only \$25,000 and if the FCC approved \$10,000 as reimbursable expenses for the Red Lion permit, the intent was that the cap for the remaining four permits would have been only \$15,000. Id.

(f) In fact, none of the other four permits was ever sold, all were turned in to the Commission for cancellation and \$10,000 was the total and only amount of expenses recovered by Raystay for all of the construction permits. Glendale Ex. 228 at 4-5.

11. Aggregate cost estimates for all five construction permits. Mr. Berfield's letter dated November 7, 1991 listed the

expenses he had found and stated his opinion that total compensation for all five permits in the amount of \$30,000 could be justified:

(a) Mr. Berfield's letter stated that his firm's records indicated that the legal fees for all five permits totaled \$15,397.03. TBF Ex. 232 at 1. He determined that figure by reviewing his law firm's invoices. Glendale Ex. 224 at 2-5, 15-25. For invoices prepared by him, he referred to the invoice and the available time records of attorneys. For invoices prepared by Mr. Cohen, he referred to the same sources and also asked Mr. Cohen about the services performed and how he arrived at the amounts billed.³ When Mr. Berfield allocated only a portion of the legal fee on a given invoice to the permits, he determined if any identifiable disbursements related to the permits. He applied the proportionate fee percentage (e.g., 50% of total fees) to the total of all other disbursements for which the precise purposes could not be determined (such as long distance calls, xerox charges and postage). Glendale Ex. 224 at 3.

(b) Mr. Berfield's letter listed \$7,275 in engineering fees and \$1,092.01 in fees to Telsa for obtaining transmitter sites. TBF Ex. 232 at 1. He obtained these figures from David Gardner.

³ Lewis I. Cohen received the degree of Bachelor of Laws from the Law School of Columbia University in 1958, was employed as an attorney with the FCC from 1959 to 1964 including service in the Hearing Division of the Broadcast Bureau, and has practiced law with Mr. Berfield in the firm Cohen & Berfield since 1964. He and Mr. Berfield have represented George Gardner and entities in which he has or has had an interest since the late 1960's or early 1970's. Glendale Ex. 225 at 1.

Glendale Ex. 224 at 5.

(c) Mr. Berfield's letter listed \$1,875 in FCC filing fees. TBF Ex. 232 at 1. He determined that amount from his file copies of the FCC applications. Glendale Ex. 224 at 5.

(d) The foregoing, itemized expenses totaled \$25,639.04. Mr. Berfield testified that it has been his experience that after the initial determination of the principal expenses such as legal, engineering and filing fees, additional expenses can be found in more detailed research regarding such matters as (a) travel expenses, (b) long distance telephone calls, postage and other similar office expenses of the applicant entity, (c) equipment that might be on hand and included in the sale, (d) rental fees or other payments to the owners of transmitter sites, (e) salary payments to company employees who are not principals of the applicant, ⁴ and the like. Glendale Ex. 224 at 5-6. In fact, when discovery research was subsequently conducted in this proceeding, one item alone, i.e., payments to the consulting engineer, uncovered an additional \$3,000. Id.

12. Allocation of a portion of the aggregate costs to the Red Lion permit. Subsequent to Mr. Berfield's letter dated November 7, 1991 and before he went on vacation on December 20, 1991 (probably in late November or the first ten days of December), David Gardner called Mr. Berfield and asked him to determine if a sale of the Red Lion construction permit for the

⁴ Approved in D. H. Overmyer Communications Co., Inc., 54 FCC2d 1045, 34 RR2d 1317 (Rev.Bd. 1975).

sum of \$10,000 could be justified. Glendale Ex. 224 at 6, Tr. 5407. David Gardner also asked Mr. Berfield to provide the expense information to him, indicating that he (David Gardner) would submit that information to the Arent-Fox law firm which, as communications counsel for Mr. Grolman, was to prepare the assignment application. Id. ⁵

13. In making an allocation of the costs to the Red Lion permit, Mr. Berfield referred to his letter of November 7, 1991, to the invoices of his law firm and to the available attorney time sheets. Tr. 5407-09. He determined that with one minor exception, all of the work in question related to the five permits in the aggregate and would have been required if only one application had been prepared. Glendale Ex. 224 at 8-9, Tr. 5408. Mr. Berfield researched Commission case law concerning the allocation of costs among multiple construction permits. The only case he found on the subject was the Integrated Communications decision. ⁶ Tr. 5410, 5413. The applications in that case were customized applications with program percentages and special showings quite different from Raystay's applications. Tr. 5412. Mr. Berfield thought the main principle of that case was that a lawyer's good faith apportionment should be credited.

⁵ This procedure is often followed in assignment applications since the assignor no longer has a long-term interest in the matter and desires to limit its legal costs in effecting the assignment and consummating the transaction. Testimony of Mr. Berfield, having some 35 years experience in the practice of communications law, in Glendale Ex. 224 at 6-7.

⁶ Integrated Communications Systems, Inc. of Massachusetts, 5 RR2d 725 (Rev.Bd. 1965).

Id.

14. Mr. Berfield relayed his conclusions concerning the allocation of expenses to the Red Lion construction permit to David Gardner in a telephone conversation in late November or December 1991. Glendale Ex. 224 at 7. Mr. Berfield said that Raystay could allocate one-half of the total legal fees, one-third of the total engineering fees and the individual FCC application filing fee. Tr. 5413. The resulting dollar figures were: \$7,698 for legal fees, \$2,425 for engineering fees and \$375 for the FCC filing fee, for a total of \$10,498. Glendale Ex. 224 at 7. Mr. Berfield briefly mentioned his allocation theory to David Gardner, but he does not think he mentioned the Integrated case. Tr. 5413.

15. Preparation of expense certification for filing with the FCC. Mr. Berfield asked if David Gardner wanted him to write something up, but David Gardner said that Arent-Fox would take care of it. Tr. 5420. Mr. Berfield went on vacation on December 20, 1991. Glendale Ex. 224 at 7. At that time, he thought the matter had been taken care of, and he did not include it on the list of pending projects that he gave to Mr. Cohen when he left. Id., Glendale Ex. 225 at 1, Tr. 5420.

16. On December 30, 1991, Mr. Cohen took a telephone call from David Gardner in the absence of Mr. Berfield and also in the absence of John Schauble, leaving Mr. Cohen the only attorney in the office. Glendale Ex. 225 at 1-2. David Gardner told Mr. Cohen that he urgently needed a certification of expenses

regarding the Red Lion construction permit to provide to counsel for the assignee. Glendale Ex. 225 at 2. While Mr. Cohen had a general familiarity with the fact that Raystay was assigning the permit, he had not been involved in the details. Glendale Ex. 225 at 1. David Gardner provided to Mr. Cohen the dollar figures and expense categories which he said Mr. Berfield had given him for such a certification. Glendale Ex. 225 at 2. Mr. Cohen has been a law partner of Mr. Berfield for 30 years and has known and worked with David Gardner since the 1970's. Based upon that long experience, he believed that the information developed by Mr. Berfield was true and that David Gardner had given it to him accurately. Glendale Ex. 225 at 1-2.

17. On the next day, December 31, 1991, Mr. Cohen prepared a Certification of Expenses using the information provided by David Gardner, and faxed it to David Gardner. Glendale Ex. 225 at 2. The certification itemized the expenses as follows:

Cohen & Berfield, P.C.	
Legal Fees	\$ 7,698.00
Robert Hoover	
Engineering Fees	2,425.00
FCC Filing Fee	<u>375.00</u>
	\$10,498.00

Glendale Ex. 225 at 3. The foregoing itemization is precisely as developed by Mr. Berfield, who reviewed the expense certification and verified this when he returned from vacation to learn that the certification had been drafted by Mr. Cohen in his absence. Glendale Ex. 224 at 12-13, Tr. 5420.

18. Signature of expense certification and assignment application. David Gardner and Mr. Sandifer discussed the numbers in the expense certification on January 6, 1992. Tr. 5582. At that point in time, David Gardner had signed the expense certification. Id. Prior to signing the application, Mr. Sandifer asked David Gardner if he had reviewed the certification of expenses with Cohen & Berfield and if the expenses were supportable to the FCC. Tr. 5575, 5577. David Gardner said yes. Glendale Ex. 228 at 5, Tr. 5577. Mr. Sandifer signed the assignor's portion of the assignment application on that date, i.e., January 6, 1992. TBF Ex. 241 at 3. The application was filed by David Tillotson of the Arent-Fox firm on January 14, 1992. TBF Ex. 241.

19. During the period that the Red Lion assignment application was completed and signed, George Gardner was on the west coast on a combined holiday and business trip. Glendale Ex. 226 at 2, Glendale Ex. 228 at 5. He left Pennsylvania on December 28, 1991 and returned to the office on January 13 or 14, 1992. Id., Tr. 5610, 5640. He did not see the Red Lion assignment application (including the expense certification) prior to the time it was filed. Tr. 5638-39. He first saw the assignment application and the expense certification in preparation for these proceedings. Tr. 5616, 5639. If George Gardner had been in the office when the application was to be signed, he would have reviewed and signed the application, as was his custom. Glendale Ex. 226 at 2, Tr. 5613.

20. Justification for reliance on communications counsel by Raystay. George Gardner has been informed that the expense categories and amounts on the certification were prepared by Mr. Berfield and that Mr. Cohen prepared the text of the certificate. He has also been informed that Mr. Berfield personally did the work to determine the amounts of expenses shown on the certification. George Gardner testified that he regards the categories of expenses that may be reimbursed under the FCC regulations and the format of the expense certification to be matters within the expertise of Messrs. Berfield and Cohen. They have been George Gardner's communications counsel for over thirty years and they are familiar with his commitment to the FCC to take care that all statements in applications signed by him are accurate. Given these circumstances, George Gardner testified that it was appropriate -- in reliance on Messrs. Berfield and Cohen -- for David Gardner to sign the expense certification and for Mr. Sandifer to sign the assignment application. Glendale Ex. 226 at 2-3, Tr. 5614.

21. FCC acceptance of expense certification. Raystay and Cohen & Berfield were never notified by the Commission that any additional expense information was needed. Glendale Ex. 224 at 13. Glendale offered for the record evidence of the contemporaneous use of a similar format in low power television "unbuilt CP" assignment applications (i.e., a listing of categories of expenses and amounts without supporting invoices or declarations) filed by various parties and various communications

law firms including Trinity and its communications counsel. Glendale Ex. 229 for identification. Following Glendale's offer of such evidence (Tr. 5388-91), the following colloquy occurred:

Mr. Shook: ...the Bureau's position would be that the low power television branch and the Video Services Division made the determination of what materials need to be submitted in the first instance in order to satisfy that portion of the Commission [sic] that a certification is appropriate and if those portions of the Commission [sic] do not as a regular practice require submissions of these materials then, frankly, this material simply does not need to be added to the record.

Judge Chachkin [addressing counsel for Trinity]: Now, do you have any evidence that any...such a requirement, that there is normally a requirement in low power for submission of underlying documents when you seek to sell a permit?

Mr. Holt: I have no evidence of that, Your Honor.

Judge Chachkin: ...What I propose to do is I don't want to muddy the waters here and I will not receive Glendale Exhibit 229 but it will go forward as an offer of proof and if questions come up -- it won't come up before me, but if it comes up before some other authority, you'll be able to point to these documents and make these arguments, but it's not going to be a factor in this proceeding since I think the Bureau has correctly stated what the issue is here and it doesn't concern whether or not the underlying documents were submitted or not. It concerns the credibility of the request for reimbursement.

Tr. 5392-93. The assignment application was routinely granted in March 1992. Id.

B.

Analysis of the expense allocation

22. Mr. Berfield believes the certification of expenses is accurate. Glendale Ex. 224 at 13, Tr. 5416. He testified that there was never any intent on his part to misrepresent facts to the Commission or to conceal any facts from the Commission. Glendale Ex. 224 at 13. This testimony is supported and

corroborated by the following analysis of how Mr. Berfield determined the amount of allocable expenses and how these figures relate to the work done with respect to Raystay's low power television applications and construction permits.

(1)
Legal fees

23. Raystay had total legal fees in the amount of \$15,397.03 with respect to the five unbuilt construction permits. TBF Ex. 232 at 1. Mr. Berfield determined that one-half of that total, or \$7,698, constituted expenses that could be reimbursed in connection with the Red Lion permit. Glendale Ex. 224 at 7.⁷ His rationale for doing so was that, for the most part, the legal work for any one of the permits also related to each of the other permits, so the lion's share of the fees for such work could be allocated to Red Lion or to any other permit that might be the first or only permit assigned. Glendale Ex. 224 at 7-9.

24. Mr. Berfield reviewed the invoices to see if any of the services were broken out by individual permit. Tr. 5507. With the exception of one minor bill that had a specific reference to Red Lion, none of the bills was broken out in that manner. Glendale Ex. 224 at 25, 16-24. The bill for the initial fee of \$5,200 was for the preparation and filing of the five applications, based upon a fee of \$4,000 for one application and \$300 for each additional application. Glendale Ex. 224 at 7-8,

⁷ Mr. Berfield did not parse out 50% of each individual bill for legal services, rather, he took 50% of the total figure. Tr. 5508.

Tr. 5505. This breakdown of that fee was premised upon the fact that there was very little difference in the non-engineering portions of the applications that were prepared by Cohen & Berfield. Glendale Ex. 224 at 7-8. Mr. Berfield personally prepared those applications. He prepared the Red Lion application first, and the four Lebanon and Lancaster applications were copied from the Red Lion model. Glendale Ex. 224 at 8. The only changes on the non-engineering portion of the other four applications were the channel numbers, communities of license and site information, i.e., owner of the site, his or her telephone number, etc. Id., compare TBF Ex. 207 at 1-7 with TBF Exs. 203-206 at 1-7.

25. With respect to the balance of the legal fees, virtually all of the amount could have been attributed to Red Lion or to any other individual permit. Glendale Ex. 224 at 9. Amendments of the applications were all identical except for the channel numbers, communities of license and application file numbers. Glendale Ex. 224 at 8. The presentations to the Commission, and Mr. Cohen's consultations with the Commission's staff, regarding George Gardner's good character and a compliance program for operating stations were activities that were needed in order to secure a grant of the pending low power television applications. Id. These were the only applications then pending before the Commission in which George Gardner had an interest and therefore were the only vehicle available for him to make these presentations. Ibid at 4. These presentations applied

identically to all five applications. Ibid at 8. The same showings and conferences were required whether there was only one application or five applications. Tr. 5519. The initial work in establishing a compliance program for Raystay's operating low power television station at Dillsburg, Pennsylvania, TV40, was also a requirement needed in order to secure a grant of the pending low power television applications and to help prepare those prospective stations for commencement of operations. Again, that work applied identically to all five applications. Glendale Ex. 224 at 8.

26. Under all of the foregoing circumstances, Mr. Berfield testified that he could have allocated up to 90% of the total legal fees to the Red Lion permit, Tr. 5516, 5518-19, 5524-25, 5527-28; that he had been conservative in allocating only 50% of the total legal fees. Glendale Ex. 224 at 9, Tr. 5516, 5519, 5525. The hearing record supports that as a reasonable determination on the part of Mr. Berfield.

(2)

Engineering fees

27. One-third allocation to Red Lion based upon site-oriented engineering work for three transmitter locations. Although five low power television applications were filed by Raystay in March 1989, there were only three transmitter site locations, i.e., Red Lion, Lebanon and Lancaster, since the two applications for Lebanon were for the same site and the two applications for Lancaster were for the same site. Glendale Ex. 224 at 9-10. When Mr. Berfield allocated engineering fees, he

had a dollar figure of \$7,275 given to him over the phone by David Gardner. Glendale Ex. 224 at 9. Mr. Berfield did not have a copy of the invoice from the consulting engineer, Mr. Hoover, at that time. Id. Mr. Berfield had worked with Mr. Hoover in the preparation of the applications and in ensuing work relative to securing FAA approval of the antenna proposals. Glendale Ex. 224 at 9-10. He assumed that this dollar figure covered all of Mr. Hoover's work including his searches of each of the three antenna sites for frequencies that complied with spacing requirements, notifications to the FAA, preparation of the engineering portions of the applications, and subsequent FAA work relating to an EMI problem. Tr. 5535. Mr. Berfield believed that the engineering work was essentially site-related, and since only three sites were involved, he allocated the engineering fee one-third to each site. Glendale Ex. 224 at 9-11. On this basis, and taking into account the factors detailed in ¶¶28-33, infra, Mr. Berfield allocated \$2,425 as the engineering fee for the Red Lion site, i.e., one-third of \$7,275. Id.

28. Three frequency studies and reports by the engineer for Red Lion, Lebanon and Lancaster. Mr. Berfield had worked with David Gardner from the beginning when Raystay first expressed interest in filing for low power television permits. Glendale Ex. 224 at 9-10. Work began in November 1988 in anticipation that the Commission would soon open up a new filing window. Glendale Ex. 224 at 10. The window did open in March 1989 and Raystay then filed the five applications under discussion here.